Rahaz Sdn Bhd v Faston Group Ltd & Ors and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-03–02 OF 2003, W-03–03 OF 2003, W-03–04 OF 2003 AND W-03–05 OF 2003

MOKHTAR SIDIN, ZALEHA ZAHARI AND HELILIAH JJCA

10 APRIL 2009

Civil Procedure — Striking out — Appeal against order allowing striking out — Whether respondents precluded from filing application to strike out appellant's claim after they filed their defence — Whether appellant had locus standi to commence proceedings against respondents — Rules of the High Court 1980 O 18 r 19

Companies and Corporations — Shares — Sale of shares — Shareholders agreement not to sell shares without prior written consent of shareholders holding more than 50% of shares — Whether share sale transaction in breach of cl 6 in shareholders agreement — Whether shareholder included beneficial owner of shares in company — Whether there were restrictions on transfer of shares of company upon its conversion into public company

There were four separate civil suits which were heard jointly and which were instituted by Rahaz Sdn Bhd ('the appellant'), the appellant in all the four civil suits. The appellant's first and second suits were against Faston Group Ltd, AICA Trading Co Ltd and Shinto Koeki Kaisha Ltd ('the Japanese shareholders'); its third suit was against the Burwood Group Ltd ('Burwood'); while its fourth suit was against the Japanese shareholders, Burwood and Merbok Hilir Bhd ('Merbok'). The appellant, the Japanese shareholders and Burwood entered into a shareholders agreement ('the shareholders agreement') dated 26 March 1996, whereby they became shareholders of Merbok. Under cl 6.1 of the shareholders agreement, a shareholder was not allowed to sell or otherwise dispose of his shares in Merbok without the prior written consent of the shareholders holding more than 50% of the shares in Merbok. Sometime in August 1999, the Japanese shareholders agreed to sell their 22,500,000 shares in Merbok ('the share sale transaction') to Burwood. The appellant was of the view that the share sale transaction between the Japanese shareholders and Burwood without their prior written consent was in breach of cl 6.1 of the shareholders agreement. The appellant also took the view that in ascertaining the 'shareholders holding more than 50% of the shares' in Merbok in cl 6.1, the shareholding of the parties involved in the

transaction should be excluded and the required 50% was to be computed from the remainder. The appellant therefore issued letters to the Japanese shareholders and Burwood to remedy the alleged breach of cl 6.1. Upon their failure to remedy the alleged breach within the specified period the appellant invoked cll 6.2 and 6.3 of the shareholders agreement. It claimed by virtue of those clauses the shareholders' agreement had automatically terminated and that the Japanese shareholders and Burwood were required to sell their shares in Merbok to the appellant. The appellant, who claimed to be the beneficial owner of 29,250,000 shares in Merbok, then commenced the present proceedings against the Japanese shareholders and Burwood for committing a breach of cl 6.1 of the shareholders agreement by not obtaining its prior written consent in respect of the share sale transaction and then committing a further breach by their failure to sell their shares in Merbok to the appellant. Although Merbok was cited as a defendant, no substantive cause of action was pleaded against them. The appellant sought specific performance of the shareholders agreement and other reliefs. In their defence the Japanese shareholders and Burwood contended that the appellant had no locus standi to commence this action against them because the appellant was not a shareholder of Merbok and therefore there was no requirement to obtain its consent under cl 6.1 of the shareholders agreement. Alternatively they submitted that even if the appellant was accepted as a shareholder of Merbok, the requisite consent had been obtained, because in computing the 50% consent requirement in cl 6.1, the shareholding of persons involved in the transaction must be included and that in the circumstances of this case the requisite consent had been obtained. Thus they maintained that there was no breach of the shareholders agreement to be remedied. It was further pleaded that since Merbok had changed its status to a public company, cl 6.1 of the shareholders agreement had no longer any effect. Merbok also raised the defence that the appellant had no locus standi to institute proceedings against it when it was not a registered shareholder of Merbok. After filing their respective defence to the suit the Japanese shareholders, Burwood and Merbok filed their respective applications to strike out the appellant's claim against them pursuant to O 18 r 19 of the Rules of the High Court 1980 ('RHC'). When the senior assistant registrar ('the SAR') allowed the striking out applications and struck out the appellant's suit as against the respective applicants, the appellant appealed to a judge in chambers. The judge affirmed the SAR's decision and hence this appeal. The appellant in reliance on the Supreme Court decision in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 ('the *Alor Janggus* case') raised a preliminary issue that since the respondents had filed their respective defence they were precluded from filing an application to strike out the appellant's claim under O 18 r 19 of the RHC.

A B C D E F G H I

Held, dismissing the appeals with costs:

(1) The preliminary issue was devoid of merit because the court may strike out a pleading 'at any stage of the proceedings'. The decision of the Supreme Court in the *Alor Janggus* case was merely obiter dictum and therefore not binding on this court (see para 17).

(2) The appellant had already admitted in its statement of claim that it was not a registered shareholder of Merbok but only a beneficial owner of 29,250,000 shares registered in the name of its specified nominees. A beneficiary of shares registered in the name of another as trustee, had no rights in that company. This conclusion is also fortified by article 6 of Merbok's memorandum and articles of association. As such, the appellant as a former shareholder could not enforce cl 6 of the shareholders agreement against any other party. The judge was therefore right in ruling that the word 'shareholder' meant a 'registered shareholder' and that the appellant was not entitled to exercise any rights under the shareholders agreement (see paras 20 & 24).

(3) Merbok was not a party to the shareholders agreement and therefore was not bound by its terms and conditions. Further by reason of ss 15 and 26 of the Companies Act 1965 there were no restrictions on the transfer of shares of Merbok upon its conversion as a public company. Accordingly cl 6 of the shareholders agreement could no longer have any effect and the claim against Merbok was rightly struck out (see paras 25–27).

(4) The phrase 'the prior written consent of the shareholders holding more than 50% of the shares in Merbok' in cl 6.1 of the shareholders agreement must be construed to mean 50% of the total shareholdings of Merbok and not as interpreted by the appellant. The intention of the parties to the shareholders agreement was clear and no extraneous evidence was to be adduced in the interpretation of the shareholders agreement (see paras 29–30).

(5) The correct principles for striking out had been applied by both the SAR and the judge and it was plain and obvious that the appellant's claim against all the respondents was futile (see para 31).

[Bahasa Malaysia summary

Terdapat empat guaman sivil berasingan didengar bersama yang dimulakan oleh Rahaz Sdn Bhd ('perayu'), perayu dalam keempat-keempat guaman sivil tersebut. Guaman pertama dan kedua perayu adalah terhadap Faston Group Ltd, AICA Trading Co Ltd dan Shinto Koeki Kaisha Ltd ('pemegang-pemegang saham Jepun'); guaman ketiganya adalah terhadap Burwood Group Ltd ('Burwood'); manakala guaman keempatnya adalah

terhadap pemegang-pemegang saham Jepun tersebut, Burwood dan Merbok Hilir Bhd ('Merbok'). Perayu, pemegang-pemegang saham Jepun dan Burwood telah memeterai perjanjian pemegang-pemegang saham ('perjanjian pemegang-pemegang saham') bertarikh 26 Mac 1996, di mana mereka telah menjadi pemegang-pemegang saham Merbok. Di bawah klausa 6.1 perjanjian pemegang-pemegang saham, seorang pemegang saham tidak dibenarkan menjual atau sebaliknya menjual sahamnya dalam Merbok tanpa terlebih dahulu mendapat persetujuan bertulis pemegang-pemegang saham yang memegang lebih daripada 50% saham dalam Merbok. Sekitar bulan Ogos 1999, pemegang-pemegang saham Jepun telah bersetuju untuk menjual 22,500,000 saham mereka dalam Merbok ('transaksi jualan saham') kepada Burwood. Perayu berpendapat bahawa transaksi jualan saham antara pemegang-pemegang saham Jepun dan Burwood tanpa persetujuan bertulis mereka terlebih dahulu telah melanggar klausa 6.1 perjanjian pemegang-pemegang saham. Perayu juga berpendapat bahawa dalam memastikan 'pemegang-pemegang saham yang memegang lebih daripada 50% saham' dalam Merbok dalam klausa 6.1, pegangan saham pihak-pihak terlibat dalam transaksi hendaklah dikecualikan dan 50% yang diperlukan hendaklah dikira sebagai selebihnya. Perayu dengan itu telah mengeluarkan surat-surat kepada pemegang-pemegang saham Jepun dan Burwood untuk memberikan pampasan pelanggaran klausa 6.1 yang dikatakan itu. Berikutan kegagalan mereka memberikan pampasan pelanggaran yang dikatakan itu dalam tempoh yang ditetapkan perayu telah mengguna pakai klausa-klausa 6.2 dan 6.3 perjanjian pemegang-pemegang saham. Ia mendakwa bahawa menurut klausa-klausa tersebut perjanjian pemegang-pemegang saham secara automatik ditamatkan dan bahawa pemegang-pemegang saham Jepun dan Burwood dikehendaki menjual saham-saham mereka dalam Merbok kepada perayu. Perayu, yang mendakwa dirinya sebagai pemilik benefisiari 29,250,000 saham dalam Merbok, kemudiannya telah memulakan prosiding ini terhadap pemegang-pemegang saham Jepun dan Burwood kerana melakukan pelanggaran klausa 6.1 perjanjian pemegang-pemegang saham disebabkan tidak mendapatkan persetujuan bertulis terdahulu berkaitan transaksi jualan saham dan kemudian melakukan pelanggaran seterusnya dengan kegagalan mereka untuk menjual saham-saham mereka dalam Merbok kepada perayu. Meskipun Merbok dinamakan sebagai defendan, tiada kausa tindakan yang substantif diplidkan terhadap mereka. Perayu telah memohon pelaksanaan spesifik perjanjian pemegang-pemegang saham dan relief-relief lain. Dalam pembelaan mereka, pemegang-pemegang saham Jepun dan Burwood menegaskan bahawa perayu tiada locus standi untuk memulakan tindakan ini terhadap mereka kerana perayu bukan pemegang saham Merbok dan oleh itu tiada keperluan untuk mendapatkan persetujuannya di bawah klausa 6.1 perjanjian pemegang-pemegang saham. Secara alternatif mereka menghujahkan bahawa meskipun perayu diterima sebagai pemegang saham Merbok, persetujuan yang diperlukan telah diperoleh, kerana dalam pengiraan 50% daripada keperluan persetujuan

A dalam klausa 6.1, pegangan-pegangan saham orang yang terlibat dalam transaksi tersebut hendaklah dimasukkan dan oleh itu dalam keadaan kes ini persetujuan yang diperlukan telahpun diperoleh. Oleh itu mereka mempertahankan bahawa tiada pelanggaran perjanjian pemegang-pemegang saham untuk diberikan pampasan. Selanjutnya diplidkan bahawa
B memandangkan Merbok telah bertukar statusnya kepada syarikat awam, klausa 6.1 perjanjian pemegang-pemegang saham tidak lagi mempunyai apa-apa kesan. Merbok juga membangkitkan pembelaan bahawa perayu tiada locus standi untuk memulakan prosiding terhadapnya memandangkan ia bukan pemegang saham berdaftar Merbok. Setelah memfailkan pembelaan
C mereka masing-masing terhadap guaman tersebut pemegang-pemegang saham Jepun, Burwood dan Merbok memfailkan permohonan-permohonan mereka untuk membatalkan tuntutan perayu terhadap mereka menurut A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Apabila penolong kanan pendaftar ('PKP') membenarkan permohonan-permohonan
D pembatalan dan membatalkan guaman perayu terhadap pemohon-pemohon, perayu telah merayu kepada hakim dalam kamar. Hakim itu mengesahkan keputusan PKP dan justeru itu rayuan ini. Perayu dalam bergantung kepada keputusan Mahkamah Agung dalam kes *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 ('kes *Alor Janggus*')
E membangkitkan isu awalan bahawa memandangkan responden-responden telah memfailkan pembelaan mereka maka mereka dihalang daripada memfailkan permohonan untuk membatalkan tuntutan perayu di bawah A 18 k 19 KMT.

F

Diputuskan, menolak rayuan-rayuan dengan kos:

(1) Isu awalan tidak mempunyai merit kerana mahkamah boleh
G membatalkan pliding 'pada mana-mana peringkat prosiding'. Keputusan Mahkamah Agung dalam kes *Alor Janggus* hanyalah obiter dictum dan oleh itu tidak mengikat mahkamah ini (lihat perenggan 17).

(2) Perayu telahpun mengaku dalam penyataan tuntutannya bahawa ia
H bukan pemegang saham Merbok tetapi hanya pemilik benefisiari 29,250,000 saham yang didaftar atas nama calon-calon mereka yang telah yang ditetapkan. Benefisiari saham-saham yang didaftarkan atas nama lain sebagai pemegang amanah, tidak mempunyai hak dalam syarikat tersebut. Kesimpulan ini juga diperkuatkan oleh perkara 6
I memorandum dan artikel persatuan Merbok. Oleh itu, perayu sebagai bekas pemegang saham tidak boleh menguatkuasakan klausa 6 perjanjian pemegang-pemegang saham terhadap mana-mana pihak lain. Hakim dengan itu adalah betul dalam memutuskan bahawa perkataan 'pemegang saham' bermaksud 'pemegang saham yang berdaftar' dan

bahawa perayu tidak berhak untuk menggunakan apa-apa hak di bawah perjanjian pemegang-pemegang saham (lihat perenggan 20 & 24).

(3) Merbok bukan pihak kepada perjanjian pemegang-pemegang saham itu dan oleh demikian tidak terikat dengan terma-terma dan syarat-syaratnya. Selanjutnya, oleh sebab ss 15 dan 26 Akta Syarikat 1965, tiada sekatan ke atas pemindahan saham-saham Merbok setelah penukarannya sebagai syarikat awam. Oleh itu klausa 6 perjanjian pemegang-pemegang saham tidak lagi mempunyai apa-apa kesan dan tuntutan terhadap Merbok telah dibatalkan sewajarnya (lihat perenggan 25–27).

(4) Istilah 'persetujuan bertulis terdahulu daripada pemegang-pemegang saham yang memegang lebih daripada 50% saham-saham Merbok' dalam klausa 6.1 perjanjian pemegang-pemegang saham hendaklah ditafsirkan sebagai bermaksud 50% daripada keseluruhan pegangan saham Merbok dan bukan seperti yang ditafsirkan oleh perayu. Niat pihak-pihak kepada perjanjian pemegang-pemegang saham adalah jelas dan tiada keterangan luaran perlu dikemukakan dalam pentafsiran perjanjian pemegang-pemegang saham (lihat perenggan 29–30).

(5) Prinsip-prinsip yang betul untuk pembatalan telah digunakan oleh kedua-dua PKP dan hakim dan adalah nyata dan jelas bahawa tuntutan perayu terhadap kesemua responden adalah sia-sia (lihat perenggan 31).]

Notes

For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 886–902.

For cases on striking out in general, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6653–6808.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241, SC (refd)

Legislation referred to

Companies Act 1965 ss 15, 15(1), (1)(a), 16(6), 26, 26(2), 33, 158(4), 163(4)

Rules of the High Court 1980 O 18 r 19, 19(1)

Appeal from: Civil Suit No D7–22–3239 of 1999 (High Court, Kuala Lumpur)

Firoz Hussien bin Ahmad Jamaludin (Dominic Putucheary and Cheng Mai with him) (Putucheary Firoz & Mai) for the appellant in all four appeals.

Lambert Rasa-Ratnam (Gan Khong Aik and Thuang Kah See with him) (Lee Hishammuddin Allen & Gledhill) for the respondents in Civil Appeal Nos W-03–02 of 2003 and W-03 of 2003.

Tommy Thomas (Alan Gomez with him) (Tommy Thomas) for the respondents in Civil Appeal No W-03–04 of 2003.

Balvinder Singh Kenith (Kumar Partnership) for the respondents in Civil Appeal No W-03–05 of 2003.

Zaleha Zahari JCA (delivering judgment of the court):

[1] Appeal No W-03–02 of 2003, No W-03–03 of 2003, No W-03–04 of 2003 and No W-03–05 of 2003, were heard jointly. All four appeals were dismissed with costs on 7 November 2006 for the following reasons.

[2] In this judgment parties will be referred to as follows: Rahaz Sdn Bhd (the appellant in all four appeals) will be referred to as 'Rahaz'. Faston Group Ltd (the first respondent in Appeal No W-03–02 of 2003 and Appeal No W-03–03 of 2003) will be referred to as 'Faston'. AICA Trading Co Ltd (the respondent in Appeal No W-03–02 of 2003 and Appeal No W-03–03 of 2003) will be referred to as 'AICA'. Shintoa Koeki Kaisha Ltd, (the respondent in Appeal No W-03–02 of 2003 and Appeal No W-03–03 of 2003) will be referred to as 'Shintoa'. Faston, AICA and Shintoa will collectively be referred to as 'the Japanese shareholders'. Burwood Group Ltd (the respondent in Appeal No 03–04 of 2003) will be referred to as 'Burwood'. Merbok Hilir Bhd (the respondent in Appeal No W-03–05 of 2003) will be referred to as 'Merbok'.

[3] Unless expressly stated, reference to any legal provision refers to the provisions of the Companies Act 1965.

BACKGROUND

[4] By a shareholders agreement dated 26 March 1996 between Rahaz, Faston, AICA, Shintoa and Burwood, ('the shareholders agreement') they all became shareholders of Merbok on terms specified therein. The shareholders agreement, inter alia, provides as follows:

6. TRANSFER OF SHARES

6.1 No Shareholder shall, without the prior written consent of the Shareholders holding more than fifty per cent (50%) of the then issued and outstanding ordinary shares:

6.1.1 ...

6.1.2 sell, transfer or otherwise dispose of any of such Ordinary Shares (or any legal or beneficial interest therein); or

6.1.3 enter into any agreement in respect of the votes attached to Ordinary Shares; or

6.1.4 agree, whether or not subject to any condition precedent or subsequent, to do any of the foregoing;

save and except in accordance with the provisions of this Clause and of Clause 7 hereof.

6.2 If in relation to any of the Shareholders ('the Defaulting Shareholder'):-

6.2.1 the Defaulting Shareholder fails to remedy any material breach on his part of this Agreement within 21 days from the service of any written notice by the other Shareholders complaining of such breach;

6.2.2 ...

6.2.3 ...

6.2.4 ...

6.2.5 the Defaulting Shareholder is the subject of any change in its control or ownership;

then upon written notice to the Defaulting Shareholder by any other Shareholder this Agreement shall automatically terminate with respect to the Defaulting Shareholder, but without prejudice to its obligations under Clause 10.2.

6.3 Within thirty (30) days after termination of this Agreement pursuant to sub-clause 6.2 any other Shareholder shall be entitled to serve a notice on the Defaulting Shareholder requiring the Defaulting Shareholder to sell to it all (but not some only) of the Ordinary Shares held by the Defaulting Shareholder. It more than one other Shareholder serves a notice simultaneously or separately within a period of not more than sixty (60) days on the Defaulting Shareholder under this sub-clause then such notices shall take effect as if they require the Defaulting Shareholder to transfer his Ordinary Shares to all other Shareholders who served such notices in proportion to the number of Ordinary Shares held by them respectively.

6.4 The Directors shall request the Auditors to determine and certify the sum per share considered by them to be the fair value thereof as at the last date of such thirty (30) day period and the sum so determined and certified shall be the price at which the Ordinary

Shares held by the Defaulting Shareholder shall be transferred. If the Shareholders do not agree that the Auditor should determine the price, the Directors shall request the President for the time being of the Malaysian Association of Certified Public Accountants to appoint a qualified accountant to determine and certify the sum per share.

The decision of any accountant shall, in the absence of manifest error be binding on and conclusive as against the parties hereto. Completion of the transfer of Ordinary Shares hereunder shall take place at the Company's principal place of business at twelve noon three (3) business days after the Auditors or the accountant (as the case may be) shall have certified the fair value of the Ordinary Shares.

Provided Always that if the approval of any authority is required for such transfer completion shall place five (5) business days after the last of such approvals shall have been obtained and at such reasonable time and place as the purchasing Shareholder may specify by not less than thirty-six (36) hours written notice to the Defaulting Shareholder whereupon:

6.4.1 the Defaulting Shareholder shall deliver to the purchasing Shareholder a duly executed transfer or transfers in favour of the purchasing Shareholder or as it may direct together with the share certificate in respect of the said Shares and (if requested by the purchasing Shareholder) a power of attorney in such form and in favour of such person as the purchasing Shareholder may nominate so as to enable the purchasing shareholder to exercise all rights of ownership in respect of the said shares including, without limitation, the voting rights thereto;

6.4.2 against such delivery, the purchasing Shareholder shall pay the purchase price for the said Shares to the Defaulting Shareholder by bankers' draft for value on the date of completion;

6.4.3 the parties hereto shall procure (insofar as they are able) that the said transfer or transfers shall be registered;

6.4.4 the Defaulting Shareholder shall do all such other things and execute all such other documents as the purchasing Shareholder may require to give effect to the sale and purchase of the said Shares; and

6.4.5 if requested by the purchasing Shareholder, the Defaulting Shareholder shall procure the resignation of all the Directors appointed by it (and its predecessors in title to the said Shares) and such resignation shall take effect without any liability on the Company for compensation for loss of office or otherwise.

6.5 If any approval necessary for the sale and purchase is refused or is not obtained within four (4) months of the termination of this Agreement and if possible, is not waived by the purchasing Shareholder, the purchasing Shareholder shall be entitled to nominate in writing, a third party or parties to accept a transfer of the said shares pursuant to the terms aforesaid in his its place.

8.1 Except as otherwise provided herein, this Agreement shall continue in full force and effect without limit in point of time until the earlier of the following events:-

8.1.1 the Shareholders agree in writing to terminate this Agreement;

8.1.2 an effective resolution is passed or a binding order is made for the winding up of the Company; and

8.1.3 the obtaining of the last of the approvals necessary for the listing of the Ordinary Shares of the Company on the Kuala Lumpur Stock Exchange;

Provided however, that this Agreement shall cease to have effect as regards any Shareholder who ceases to hold any Ordinary Shares save for any provisions hereof which are expressed to continue in force thereafter.

...

...

11.5 Survival of Rights, Duties and Obligations

Termination of this Agreement for any cause shall not release a party from any liability which at the time of termination has already accrued to another Shareholder or which thereafter may accrue in respect of any act or omission prior to such termination.

[5] Sometime in August 1999 the Japanese shareholders entered into a sale and purchase agreement with Burwood by which agreement the Japanese shareholders agreed to sell the 22,500,000 shares in Merbok, and Burwood agreed to acquire the said shares, ('the share sale transaction'). Burwood then, by a facsimile message dated 26 August 1999, informed Dato' Samsudin bin Abu Hassan, the controlling shareholder of Rahaz, of the said share sale transaction.

[6] Rahaz was of the view that the share sale transaction between the Japanese shareholders and Burwood without obtaining their prior written consent was in breach of cl 6.1 of the shareholders agreement. Rahaz interpreted cl 6.1 to mean that the share sale transaction was subject to the

approval of more than 50% of the shareholders of Merbok and that, in ascertaining the shareholder or shareholders having more than 50% shareholding in cl 6.1, the shareholding of parties involved in the transaction should be excluded, and the required percentage of the 50% computed from the remainder. Rahaz then, through their solicitors, issued a letter dated 3 September 1999 giving notice to Burwood to remedy the alleged breach. Similar notices by letters dated 8 October 1999 were issued by Rahaz's solicitors to Faston, AICA and Shintoa. Burwood and the Japanese shareholders did not remedy the alleged breach within the period specified in the said notices.

[7] Rahaz then claimed, that Burwood's and the Japanese shareholders' failure to remedy the alleged breach of cl 6.1, pursuant to cl 6.2 automatically terminated the shareholders agreement. Further letters dated 5 October 1999 and 6 October 1999 were issued by Rahaz's solicitors, requiring Burwood to sell their shares in Merbok to Rahaz pursuant to cl 6.3. Similar letters, all dated 3 November 1999, were issued by Rahaz's solicitors to the Japanese shareholders also requiring them to sell their shares in Merbok to Rahaz.

[8] Burwood's reply through their solicitors, Messrs Shook Lin & Bok (by letters dated 6 October 1999 and that dated 7 October 1999) denied that Burwood was in breach of the shareholders agreement as alleged.

[9] Rahaz then contended that the Japanese shareholders' and Burwood's failure to sell their Merbok shares to them constitutes a further breach of the shareholders' agreement.

[10] On 17 December 1999 Rahaz commenced proceedings for specific performance of the shareholders agreement and other reliefs against the Japanese shareholders and Burwood. As for Merbok, who was cited as fifth defendant, no substantive cause of action was pleaded against them save in general terms, ie, for an order that Merbok 'comply with such orders for specific performance as may be granted by the court'.

[11] Rahaz's rests their claim on the following basis namely that they were the beneficial owner of 29,250,000 shares in the Merbok which was held by the following nominees: Arab Malaysian Nominees (Tempatan) Sdn Bhd 6,750,000 shares and Amsec Nominees (Tempatan) Sdn Bhd, 22,500,000 shares. Rahaz alleged as a shareholder holding 78.3%, and/or in any event more than 50% of the then issued ordinary shares in Merbok, their prior written consent was necessary in respect of the said share sale transaction. Further or alternatively, Rahaz alleged, apart from itself, the Japanese shareholders and Burwood, the consent of the other shareholders of Merbok whose shareholdings amounting to 8,100,000 ordinary shares was also

required. In their reply to the defence filed by the respondents, Rahaz's case was that Merbok was bound to recognise Rahaz's beneficial ownership of shares in Merbok. According to Rahaz the conversion of Merbok as a public company does not affect the shareholders' agreement and that Merbok was required to adopt a neutral stand in shareholders' disputes. Rahaz further alleged that Merbok's managing director was manipulating Merbok to serve the purposes of the Japanese shareholders and Burwood. Be that as it may, this allegation of manipulation has not been particularised.

[12] The Japanese shareholders in their defence contended that Rahaz had no locus standi to commence this action against them, and did not have a reasonable cause of action as against them for the following reasons: there is no requirement to obtain Rahaz's consent as Rahaz is not a shareholder of Merbok. Alternatively, even Rahaz is accepted as a 'shareholder' of Merbok, Rahaz's consent need not be obtained as the required consent from shareholders holding more than 50% of the then issued and outstanding shares in Merbok had already been obtained. The construction to be given to the words in Merbok in cl 6.1 read together with cl 6.1.2 of the shareholders agreement, was that the shareholding of parties involved in the transaction must be included in computing the required percentage and that such consent had been obtained. The Japanese shareholders denied that they were in breach of cl 6.1 of the shareholders agreement and the question of remedying any breach, as well as automatic termination of the shareholders agreement as contended by Rahaz, did not arise. It was further pleaded the share sale transaction had since been completed. Further, upon Merbok's conversion as a public company, cll 6.1 and 6.1.2 of the shareholders agreement no longer had any effect.

[13] Burwood in its defence also pleaded that Rahaz had no cause of action against them. According to Burwood it was inaccurate to describe Rahaz as a 'shareholder' of Merbok, and that Rahaz did not have locus standi to institute proceedings against them. It also took issue with Rahaz's interpretation of cl 6.1 of the shareholders agreement. Burwood's interpretation of cl 6.1 was that as pleaded by the Japanese shareholders, which that is computing the 50% consent requirement in cl 6.1, the shareholding of persons involved in the transaction must be included, and that in the circumstances of this case the requisite consent had been obtained. There was accordingly no breach of the shareholders agreement in relation to the share sale transaction, to be remedied. The shareholders agreement accordingly did not terminate and Rahaz did not acquire the right to compulsorily acquire their shares. It was further pleaded that cll 6.1 and 6.1.2 of the shareholders agreement no longer had effect in view of the Merbok's changed status as a public company.

[14] Merbok's defence also raised the issue of Rahaz's locus standi to institute proceedings against them by reason of Rahaz not being a registered shareholder of Merbok. Merbok cannot refuse any share transfers presented to them. In view of Merbok's converted status as a public company with effect from 10 October 1996, all restrictions, limitations and prohibitions relating to the transfer of Merbok's shares ceased to apply.

[15] After filing their respective defence, Faston, AICA and Shintoa, had, vide encll 57 and 58, Burwood vide encl 52, whilst Merbok vide encl 61, filed their respective applications to strike out the action against them pursuant to O 18 r 19 of the Rules of the High Court 1980 ('the Rules'). The senior assistant registrar allowed all four striking out applications and struck out the appellant's suit as against the respective applicants. On appeal to the judge in chambers vide encll 183, 184, 185 and 186 respectively, (which appeals were heard jointly on 26 November 2002) the High Court judge affirmed the SAR's decision.

DECISION

[16] Our view on the preliminary issue raised by the appellant's counsel are these. The appellant submitted that the respondents, having entered an unconditional appearance and filed their respective defence, were precluded from filing an application to strike out under O 18 r 19(1) of the Rules. Reliance for this contention was placed on the Supreme Court decision in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241.

[17] We are of the view that nothing turns on this point. Order 18 r 19 is explicit. The court may strike out a pleading 'at any stage of the proceedings'. The decision of the Supreme Court in *Alor Janggus* was merely an obiter dictum, and therefore not binding on this court. This preliminary issue was devoid of merit and rightly rejected by the High Court judge.

[18] On the issues raised in arguments on the merits are as follows.

Whether Rahaz is a 'shareholder' of Merbok at the point of time of the alleged breach and at the commencement of proceedings?

[19] In making a considered decision on this issue the following provisions applies. A person is a member/shareholder of a company if his name is included in the company's register of members (s 16(6)).The register of members is prima facie evidence of the matters stated therein (s 158(4)). The

memorandum and articles of association are binding on every member or shareholder of a company (s 33). No notice of any trust shall be entered on a register of a company (s 163(4)).

[20] On the facts of this case, by Rahaz's own admission in their statement of claim, they are not a registered shareholder of Merbok, but only a beneficial owner of the 29,250,000 shares registered in the name of the specified nominees. Rahaz's argument was that 'shareholder' must be construed to include a party who had pledged their shares. The judge however held that such beneficial ownership cannot be taken into account. We agree. A beneficiary of shares, registered in the name of another as trustee, had no rights in such company. This conclusion is fortified by article 6 of the Merbok's memorandum and articles which states:

> No person shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be required in any way to recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other rights in respect of any share other than an absolute right to the entity thereof in the registered holder except only as by these Articles otherwise provided for or as by Act required or pursuant to any order of court.

[21] If any of the party to the shareholders agreement no longer holds any ordinary shares in Merbok, that shareholder can no longer enforce the agreement as the said agreement would no longer have any effect vis-a-vis the said former shareholder. The proviso to cl 8 states:

> provided however, that this Agreement shall cease to have effect as regards any Shareholder who ceases to hold any Ordinary Shares save for any provisions hereof which are expressed to continue in force thereafter.

[22] In the case of cl 6, the said provision does not provide that it shall remain in force in relation to former shareholders. Rahaz, as a former shareholder cannot enforce cl 6 of the shareholders agreement against any other party. The judge was accordingly right in finding that the shareholders agreement ceased to have effect as against Rahaz.

[23] The facts also shows that Rahaz has lost such beneficial rights in the shares upon which their claim is based soon after the commencement of this action. As at 8 September 2000, about ten months after the date of the filing of the action, those shares had been registered in Kilang Bumi Aluminium Sdn Bhd ('Kilang Bumi'). Rahaz's attempt to question the transfer of the shares to Kilang Bumi was clearly not maintainable as all approvals had been

obtained and the transfer of the shares to Kilang Bumi has been completed. Rahaz clearly no longer had any rights or claim on those shares upon which their claim rests.

[24] To conclude on this issue, we are of the view that the High Court judge was, in considering cll 3, 6 and cl 7.10 of the shareholders agreement, right in ruling that the word 'shareholder' means a 'registered shareholder' and in ruling that Rahaz is not entitled to exercise any rights under the shareholders agreement.

Merbok's converted status as a public company

[25] Merbok was not a party to the shareholders' agreement and is not bound by the terms and conditions of the same. Rahaz clearly does have any cause of action against Merbok arising from the alleged breach, and for this reason, has not pleaded any substantive cause of action against Merbok, nor did they seek any substantive relief against Merbok.

[26] By reason of Merbok's converted status as a public company effective 10 October 1996, the following provisions were applicable. Section 15(1)(a) provides for the restriction on transfer of shares of a private company. Section 26(2) provides that when a company converts to a public company, all restrictions, limitations or prohibitions under s 15(1) ceases to form part of the memorandum and articles of association of the company. Thus, there clearly can be no restriction on the transfer of shares of Merbok upon its conversion as a public company by reason of ss 15 and 26, and accordingly cl 6 of the shareholders' agreement can no longer have any effect. Merbok, as a public company, is obliged to effect any transfer of shares lawfully obtained and presented to it.

[27] We are of the view that the inclusion of Merbok as a party to this action was clearly an abuse of the process of court and the suit against Merbok rightly struck out.

Meaning of the phrase 'the prior written consent of the shareholders holding more than fifty per cent (50%) of the then issued outstanding ordinary shares' in cl 6.1 of the shareholders agreement

[28] The judge rejected Rahaz's argument that the shareholdings of shareholders involved in the transaction must be excluded in computing the required percentage in cl 6.1.

[29] We agree with this finding of the learned judge. The interpretation suggested by Rahaz would result in the absurd situation where infinitesimal minority shareholders of Merbok could hold 99.8% of the preponderant overwhelming majority shareholders at ransom where, for example, 99.8% of shareholders were involved in a share transaction, thus excluding their votes from the percentage of votes (50%). The phrase 'the prior written consent of the shareholders holding more than fifty per cent (50%) of the then issued outstanding ordinary shares' in cl 6.1 must necessarily be construed to mean 50% of the total shareholdings of Merbok, and not that as interpreted by Rahaz.

[30] On Rahaz counsel's suggestion that due to divergent interpretation, this constituted an arguable issue and oral evidence being necessary to ascertain the intention of parties, reading the shareholders agreement as a whole, effect must be given to cl 11.6. The intention of the parties to the shareholders agreement is clear and no extraneous evidence is to be adduced in the interpretation of the shareholders agreement. As oral evidence has been expressly excluded, we are in agreement with the learned judge that this was not a basis warranting a trial.

[31] The correct principles for striking out had been applied by both the SAR and the judge. It is plain and obvious that the Rahaz's claim against all of the respondents was futile and doomed to failure. The SAR was right in allowing all of the striking out applications, and the High Court judge was also right in dismissing the corresponding appeals with costs.

[32] The appeals were accordingly dismissed with costs. The deposit to the respective respondent to account of taxed costs.

Appeals dismissed with costs.

Reported by Kohila Nesan